A

MALAYSIAN INTERNATIONAL TRADING CORPORATION SDN BHD v. RHB BANK BHD

FEDERAL COURT, PUTRAJAYA
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
B HASAN LAH FCJ
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEAL NO: 03(I)-3-03-2015 (W)]
26 JANUARY 2016

C

BANKING: *Banker and customer – Securities – Retention of customer's security – Monies in deposit account pledged by judgment debtor ('JD') as security for banking facility – Application by judgment creditor to garnish monies in deposit accounts – Whether JD's interests in deposit accounts conditional upon full*
D *repayment of banking facility – Whether debt due by JD actionable*

BANKING: *Security for advances – Illegal monies – Monies in fixed deposit accounts pledged with bank as security – Monies obtained from illegal sources – Whether bank a bona fide recipient for value and without notice – Whether rights of bank over security affected by illegal conduct of depositors – Whether obligation*
E *on bank to ascertain source of monies deposited*

CIVIL PROCEDURE: *Execution – Garnishee proceedings – Monies in deposit account pledged by judgment debtor ('JD') as security for banking facility – Application by judgment creditor ('JC') to garnish monies – Monies uplifted by bank in exercise of right of set-off to pay JD's debts with bank – Whether bank*
F *bound by outcome of proceedings between JD and JC – Whether bank could exercise right of set-off and utilise funds for its own benefit – Whether bank held monies in fixed deposit accounts on trust*

CIVIL PROCEDURE: *Res judicata – Whether applicable – Respondent not party*
G *to earlier suit – Earlier suit involving different issue or cause of action – Whether principle of res judicata applied*

The respondent bank had granted housing loan and overdraft facilities ('the facilities') to the judgment debtor ('the JD') and as part of the securities, monies in six fixed deposit accounts ('the FD accounts') were pledged with
H the respondent in a form of a letter of set-off dated 16 June 1999 ('the letter of set-off'). In 2000, the appellant sued the JD in the Singapore High Court ('the SHC') for fraud and successfully obtained judgment in the sum of US$79 million against the JD. The SHC held that the monies in the FD accounts were held on trust for the appellant ('the SHC judgment'). The appellant
I subsequently registered the SHC judgment at the Kuala Lumpur High Court under the Reciprocal Enforcement of Judgments Act 1958 on 10 March 2003. As the judgment creditor ('the JC'), the appellant filed an *ex-parte* application ('encl. 9'), naming the respondent as the garnishee, for an order

that all monies owed by the respondent/garnishee to the JD be garnished and used for payment of the debt due under the SHC judgment. A garnishment order *nisi* ('GON') was served on the respondent but the latter, in exercise of its right of set-off, proceeded to uplift the FD accounts and utilised the same to pay off the JD's debt. The Senior Assistant Registrar ('SAR') granted a garnishee order absolute. Dissatisfied with the order absolute of the SAR, the respondent filed an appeal to the High Court, which was dismissed. The respondent successfully appealed to the Court of Appeal when the High Court's orders were set aside. Hence, the present appeal. The appellant submitted that (i) since the respondent failed to intervene during the JD's application of setting aside the GON or at the stage of the JD's appeal, the respondent was estopped from re-litigating and re-arguing the issue of right of set-off; (ii) the respondent was duty-bound to obey the GON and was not permitted to deal with the monies in the FD accounts, as stipulated under O. 49 r. 3(2) of the Rules of the High Court 1980 ('RHC'); (iii) the respondent assumed the role of a trustee the moment it knew that the SHC had declared the monies were being held by the JD for the JC and therefore, it was not at liberty to exercise its right of set-off and utilise the monies for its own benefit; and (iv) the Court of Appeal failed to consider the respondent's knowledge of the trust and the ownership of the monies in the FD accounts being subject to the GON and the principles of constructive trusts. The issues that arose for the court's determination were (i) whether the respondent was bound by the outcome of the proceedings between the JD and the JC; (ii) where a garnishee had a prospective right of set-off over the JD's funds which was yet to crystallise, whether such funds could be garnished by the JC; if so, whether the garnishee was entitled to exercise its right of set-off and utilise the funds for its own benefit once it had been served with a GON; (iii) whether a garnishee with a prospective right of set-off over the JD's funds, who was put on notice that the funds were held by the JD on trust for the JC, could exercise its right of set-off and utilise the funds for its own benefit; and (iv) whether the banking industry constitutes an exception to the principle of constructive trust.

Held (dismissing appeal with costs)
Per Suriyadi Halim Omar FCJ (for the majority):

(1) Not only did two unsuspecting contracting parties not foresee an outsider one day steamrolling over the priority rights of a creditor of the JD, they were also bound by the draconian and pervasive effect of a GON. The GON was served on the respondent on 21 January 2004 while the order absolute was given by the SAR on 23 January 2013 and affirmed by the High Court on 23 January 2014. The Court of Appeal overturned the 23 January order only on 3 October 2013 *ie*, ten years and nine months from the date of the GON. Whether it was due to the nonchalant attitude of the appellant or some technical glitch, had the respondent not have reasons to set-off the FD accounts, a serious injustice could have befallen it. (para 49)

(2) To entitle a garnishor to enter judgment against a garnishee, the garnishor must at the outset establish that the money sought to be attached belonged to the JD. Perusing the letter of set-off, it was abundantly clear that the assignment of the FD accounts by the JD to the respondent was made for good consideration as a security for the facilities. The respondent was entitled to withhold the FD accounts and contractually permitted to exercise its right of set-off in the event the JD failed to regularise his accounts. The respondent had obtained equitable right much earlier than the service of the garnishee order and thus could not be denied its legal and contractual right to set-off and utilise the fund in the FD accounts. (paras 52, 56 & 58)

(3) Even though the respondent, as a garnishee, was put on notice that the funds were held by the JD on trust for the JC, the respondent had first priority to satisfy the JD's debt by virtue of the chronology of events and the effect of the equitable assignment. The GON was not binding on the respondent as it had obtained legal rights over the FD accounts way back before the SHC judgment. (para 62)

(4) A debt due and payable to the JD must exist on the day the garnishee application was filed in order to obtain the GON. When the garnishment application was filed at the *ex-parte* stage, the pre-condition of a debt due or accruing to the JD was non-existent. There was no actionable debt due or accruing to the JD. The facilities were still running smoothly. The respondent would only be having a debt due to the JD upon the termination of the facilities and the securities, either wholly or partially to be returned to the JD. In the circumstances, the garnishor could not have attached the so-called debt as it had been equitably assigned to the garnishee. (paras 68, 69 & 70)

(5) The issue between the appellant and the respondent was premised on the letter of set-off and was not concerned with whether the JD held the garnished accounts on trust for the appellant. The respondent had no duty to intervene in the JD's application as the dispute was between the appellant and the JD and was premised on the SHC judgment, in a case which the respondent was not a party. There was no evidence to indicate that the respondent was aware that the monies in the FD accounts were from bribes and had been obtained fraudulently by the JD. More importantly, the respondent was never informed that it was to hold monies in the FD accounts on trust for the appellant (paras 71 & 72).

(6) The High Court had placed undue importance on the SHC judgment, bearing in mind that it was a suit commenced by the appellant against the JD. The SHC judgment came into the picture only when the respondent was served with the cause papers of encl. 9. The respondent thereafter rightfully filed an affidavit to oppose encl. 9 what with there being no money left to garnish. The respondent even went a step further

by filing the appeal to the High Court when the GON was made absolute. The respondent had taken all necessary steps in accordance with O. 49 of the RHC. (para 75)

(7) It was not incumbent on the respondent, as a bank, to ascertain the source of monies which customers bring into the bank. There was no evidence that at the time of the set-off, the respondent was aware that the monies in the FD accounts were declared as trust monies by the SHC judgment, let alone that the said monies were from bribes. Therefore, the respondent was a *bona fide* recipient for value without notice. (para 78)

(8) Apart from deciding whether the respondent was dishonest by the ordinary standard of reasonable and honest people, the additional question to be satisfied on a subjective test was whether the respondent knew that its act was dishonest when uplifting the FD accounts. In this case, the respondent believed that it had a right to uplift the securities and utilise the monies for its own benefit. The appellant failed to establish the subjective test. The constructive trust argument posed by the appellant against the respondent must fail. (paras 79, 81 & 82)

Per Hasan Lah FCJ (dissenting):

(1) The respondent was estopped by conduct from re-litigating the issue relating to its right of set-off. The respondent had a duty to intervene in the JD's appeal to set aside the garnishee order to show cause. It was clear in that appeal that one of the issues was whether respondent was entitled to exercise a right of set-off over the monies in the FD accounts. The respondent was not entitled to do so. (para 136)

(2) The respondent stood by and saw its battle fought by the JD on the issue of its right to set off over the FD accounts and as such, it was bound by the result. The respondent could not be allowed to re-open the case. Furthermore, the decision relating to the FD accounts operated *in rem* to settle the rights of the respondent on the monies in the FD accounts. The decision was conclusive and binding upon the respondent. (para 137)

***Bahasa Malaysia** Headnote*

Responden telah memberi kemudahan pinjaman dan overdraf perumahan ('kemudahan') kepada penghutang penghakiman ('JD') dan sebagai sebahagian cagaran, enam akaun deposit tetap ('akaun FD') dicagarkan pada responden dalam bentuk surat tolak selesai bertarikh 16 Jun 1999 ('surat tolak selesai'). Pada tahun 2000, perayu menyaman JD di Mahkamah Tinggi Singapura ('MTS') atas tuduhan penipuan dan berjaya memperoleh penghakiman berjumlah US$79 juta terhadap JD. MTS memutuskan wang dalam akaun FD dipegang sebagai amanah buat perayu ('penghakiman MTS'). Perayu seterusnya mendaftarkan penghakiman MTS di Mahkamah

A Tinggi Kuala Lumpur di bawah Akta Penguatkuasaan Penghakiman Bersaling 1958 pada 10 Mac 2003. Sebagai pemiutang penghakiman ('JC'), perayu memfailkan permohonan *ex-parte* ('lampiran 9'), menamakan responden sebagai garnishee, bagi satu perintah agar wang yang dihutang oleh responden/garnishee daripada JD digarnis dan digunakan untuk membayar B hutang tertunggak di bawah penghakiman MTS. Satu perintah garnisan nisi ('GON') diserahkan kepada responden tetapi responden, dalam menjalankan hak tolak selesai, mengeluarkan wang dalam akaun FD dan menggunakannya untuk membayar hutang JD. Penolong Kanan Pendaftar ('PKP') mengeluarkan perintah garnisan mutlak. Tidak berpuas hati dengan perintah C mutlak PKP, responden memfailkan rayuan di Mahkamah Tinggi tetapi rayuan ini ditolak. Responden berjaya dalam rayuannya di Mahkamah Rayuan apabila perintah-perintah Mahkamah Tinggi diketepikan. Oleh itu, timbul rayuan ini. Perayu menghujahkan bahawa (i) oleh sebab responden gagal campur tangan semasa permohonan JD untuk mengetepikan GON atau pada peringkat rayuan JD, responden diestop daripada melitigasi dan D menghujahkan semula tentang isu hak tolak selesai; (ii) responden terikat dengan tugas mematuhi GON dan tidak dibenarkan menguruskan wang dalam akaun FD, seperti yang diperuntukkan di bawah A. 49 k. 3(2) Kaedah-kaedah Mahkamah Tinggi 1980 ('KKM'); (iii) responden memegang peranan sebagai pemegang amanah sebaik sahaja tahu bahawa MTS telah E mengisytiharkan wang yang dipegang oleh JD bagi JC dan oleh itu, tidak berkebebasan menjalankan hak tolak selesainya dan menggunakan wang tersebut bagi manfaatnya sendiri; dan (iv) Mahkamah Rayuan gagal mempertimbangkan pengetahuan responden bahawa amanah dan milikan wang dalam akaun FD tertakluk pada GON dan prinsip amanah konstruktif. F Isu-isu yang timbul bagi pemutusan mahkamah adalah (i) sama ada responden terikat dengan keputusan prosiding antara JD dan JC; (ii) apabila garnishee mempunyai hak prospektif untuk menolak selesai wang JD yang belum wujud, bolehkah wang tersebut digarnis oleh JC; jika ya, sama ada garnishee berhak menjalankan hak tolak selesai dan menggunakan wang G tersebut bagi manfaatnya sebaik sahaja garnishee menerima GON; (iii) sama ada garnishee yang diberi notis bahawa wang dipegang oleh JD sebagai amanah buat JC, mempunyai hak prospektif untuk menolak selesai wang JD, boleh menjalankan hak itu dan menggunakan wang tersebut bagi manfaatnya; dan (iv) sama ada industri perbankan membentuk satu pengecualian pada prinsip amanah konstruktif.

H

Diputuskan (menolak rayuan dengan kos)
Oleh Suriyadi Halim Omar HMP (keputusan majoriti):

(1) Bukan sahaja dua pihak berkontrak yang tidak menaruh syak wasangka tidak menjangka bahawa pada suatu hari, satu pihak luar akan mengatasi I kepentingan hak-hak pemiutang JD malah mereka terikat pada kesan drakonian dan menyeluruh GON. GON telah diserahkan kepada responden pada 21 Januari 2004 manakala perintah mutlak diberikan oleh PKP pada 23 Januari 2013 dan disahkan oleh Mahkamah Tinggi

pada 23 Januari 2014. Mahkamah Rayuan mengakas perintah 23 Januari pada 3 Oktober 2013 iaitu sepuluh tahun dan sembilan bulan dari tarikh GON. Sama ada ia disebabkan oleh sikap perayu yang acuh tak acuh atau akibat kesilapan teknikal, jika responden tidak mempunyai alasan menolak selesai akaun FD, ketidakadilan serius akan berlaku padanya.

(2) Untuk memberikan hak kepada garnishor memasukkan penghakiman terhadap garnishee, garnishor mestilah membuktikan dari awal lagi bahawa wang yang dipohon untuk dipegang, dimiliki oleh JD. Meneliti surat tolak selesai, amat jelas bahawa penyerahakkan akaun FD oleh JD kepada responden dibuat bagi jumlah yang besar sebagai cagaran kemudahan. Responden berhak menyekat akaun FD dan dibenarkan secara kontraktual untuk menjalankan hak tolak selesai sekiranya JD gagal menjaga semua akaunnya dengan teratur. Responden telah mendapat hak berekuiti terlebih dahulu sebelum penyerahakkan perintah garnisan dan dengan itu tidak boleh dinafikan hak undang-undang dan kontraktual untuk menolak selesai dan menggunakan wang dalam akaun FD.

(3) Walaupun responden, sebagai garnishee, diberi notis bahawa wang tersebut dipegang oleh JD sebagai amanah buat JC, responden mempunyai prioriti pertama untuk melangsaikan hutang JD berdasarkan kronologi peristiwa dan kesan penyerahakkan berekuiti. GON tidak mengikat responden kerana responden mempunyai hak undang-undang terhadap akaun FD lama sebelum penghakiman MTS.

(4) Hutang yang tertunggak dan perlu dibayar kepada JD mesti wujud pada hari permohonan garnishee difailkan untuk membolehkan perolehan GON. Semasa permohonan garnisan difailkan di peringkat *ex-parte*, pra-syarat hutang tertunggak atau terakru pada JD tidak wujud. Tiada hutang tertunggak atau terakru pada JD yang boleh didakwa. Kemudahan masih berjalan lancar. Responden hanya akan mempunyai hutang tertunggak terhadap JD apabila kemudahan ditamatkan dan cagaran, sama ada semua atau sebahagiannya, dipulangkan kepada JD. Dalam hal keadaan kes, garnishor tidak mungkin boleh memegang hutang yang dikatakan itu kerana ia telah diserahkan secara berekuiti kepada garnishee.

(5) Isu antara perayu dan responden adalah berdasarkan surat tolak selesai dan bukan berkenaan sama ada JD memegang akaun-akaun yang digarnis sebagai amanah buat perayu. Responden tidak berkewajipan campur tangan dalam permohonan JD kerana pertikaian adalah antara perayu dan JD dan berdasarkan penghakiman MTS, dalam kes yang responden tidak menjadi pihak. Tiada keterangan untuk menunjukkan responden sedar bahawa wang dalam akaun FD adalah wang rasuah dan telah diperolehi oleh JD melalui penipuan. Lebih penting lagi, responden tidak dimaklumkan bahawa ia perlu memegang wang dalam akaun FD sebagai amanah buat perayu.

(6) Mahkamah Tinggi meletakkan kepentingan tidak wajar pada penghakiman MTS, mengambil kira bahawa ia adalah satu guaman yang dimulakan oleh perayu terhadap JD. Penghakiman MTS timbul apabila responden diserahkan dengan kertas kausa lampiran 9. Susulan itu, responden bertindak betul dengan memfailkan afidavit menentang lampiran 9 tanpa wang berbaki untuk digarnis. Malah, responden mara satu langkah ke hadapan dengan memfailkan rayuan di Mahkamah Tinggi apabila GON menjadi mutlak. Responden telah mengambil semua langkah-langkah yang perlu, selaras dengan A. 49 KKM.

(7) Responden, sebagai bank, tidak berkewajipan memastikan sumber wang yang dibawa oleh pelanggan ke bank. Tiada keterangan bahawa pada masa tolak selesai, responden sedar wang dalam akaun FD diisytiharkan sebagai wang amanah oleh penghakiman MTS, apatah lagi sedar wang tersebut diterima melalui rasuah. Oleh itu, responden adalah penerima bagi sesuatu yang bernilai tanpa notis.

(8) Selain memutuskan sama ada responden tidak jujur berdasarkan standard biasa orang yang munasabah dan jujur, soalan tambahan yang perlu dipenuhi berdasarkan ujian subjektif adalah sama ada responden tahu tindakannya tidak jujur semasa mengeluarkan wang dalam akaun FD. Dalam kes ini, responden percaya ia berhak mengeluarkan cagaran dan menggunakan wang tersebut untuk manfaatnya. Perayu gagal membuktikan ujian subjektif tersebut. Hujahan amanah konstruktif yang dikemukakan oleh perayu semestinya gagal.

Hasan Lah HMP (menentang):

(1) Responden diestop berdasarkan kelakuannya daripada melitigasi semula isu berkaitan haknya untuk tolak selesai. Responden mempunyai tanggungjawab untuk campur tangan dalam rayuan JD untuk mengetepikan perintah garnishee bagi menunjukkan sebab. Jelas dalam rayuan tersebut bahawa salah satu isu yang timbul ialah sama ada responden berhak melaksanakan hak tolak selesai atas wang dalam akaun FD. Responden tidak berhak berbuat demikian.

(2) Responden hanya berdiam diri dan membiarkan kesnya diperjuang oleh JD mengenai isu haknya untuk tolak selesai akaun FD dan dengan itu, responden terikat dengan keputusan tersebut. Responden tidak boleh dibenarkan membuka semula kes. Tambahan lagi, keputusan berkaitan akaun FD beroperasi *in rem* untuk menjelaskan hak-hak responden atas wang dalam akaun FD. Keputusan tersebut konklusif dan mengikat responden.

Case(s) referred to:

Agip (Africa) Ltd v. Jackson [1990] 1 Ch 265 ***(refd)***
Badeley v. Consolidated Bank (1888) 38 Ch D 238 ***(refd)***
Bank of Montreal v. IM Krisp Foods Ltd (1996) 6 CPC (4th) 90 Sask CA ***(refd)***
Binamin MJC Quarry Sdn Bhd v. Way Soon Construction Sdn Bhd; TRS Bina Sdn Bhd (Garnishee); Hong Leong Finance Bhd (Intervener) [2001] 6 CLJ 213 HC ***(refd)***

Carl Zeiss Stiftung v. Herbert Smith & Co (No. 2) [1969] 2 All ER 377 ***(refd)***
Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals [2011] 7 CLJ 909 FC ***(refd)***
Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***
CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***
Curran v. Newpark Cinemas Ltd (1951) 1 All ER 295 ***(refd)***
Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***
Galbraith v. Grimshaw & Baxter [1910] 1 KB 339 ***(refd)***
Glegg v. Bromley [1912] 3 KB 474 ***(refd)***
Hall v. Pritchett [1877] 3 QBD 215 ***(refd)***
Holt v. Heatherfield Trust Ltd [1942] 1 All ER 404 ***(refd)***
Hongkong And Shanghai Banking Corporation v. Goh Su Liat (Telecommunication Authority of Singapore, Garnishee) [1985] 1 LNS 119 HC ***(refd)***
Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd & Anor [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645 HC ***(refd)***
Kwa Ban Cheong v. Kuah Boon Sek and Others [2003] SGHC 132 ***(refd)***
Lee Phet Boon v. Hock Thai Finance Corporation Bhd [1994] 3 CLJ 466 HC ***(refd)***
Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(refd)***
Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1989] 1 LNS 140 HC ***(refd)***
Mayban Trustee Bhd v. Amalan Tepat Sdn Bhd [2006] 5 CLJ 43 HC ***(refd)***
Nadikatly Anjana v. Bandi Ramakrisna (1971) 1 Audh WR 832 ***(refd)***
Nana Ofori Atta II v. Nana Abu Bonsra II [1958] AC 95 ***(refd)***
Paragon Finance Plc v. Thimbleby & Co [1999] All ER 400 ***(refd)***
Plunkett v. Barclays Bank Ltd (1936) 2 KB 107 ***(refd)***
Pyne v. Kinna [1877] IR 11 Rep CL 40 ***(refd)***
Royal Brunei Airlines Sdn Bhd v. Tan [1995] 3 All ER 97 ***(refd)***
Saw Swan Kee v. Sim Lim Finance (M) Bhd [1985] 2 CLJ 356; [1985] CLJ (Rep) 286 FC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tan Way Boon & Ors v. Omar Marican Holdings Sdn Bhd & Ors [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202 HC ***(refd)***
Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor [1996] 2 CLJ 270 CA ***(refd)***
Twinsectra Ltd v. Yardley And Others [2002] 2 All ER 377 ***(refd)***
Wearne Brothers Malaysia Sdn Bhd v. Gurdave Kaur & Anor; Baharuddin, Bernatt, Tan & Ker (As Garnishees) [1979] 1 LNS 146 ***(refd)***
Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***
Wytcherley v. Andrews [1871] LR 2 P&M 327 ***(refd)***
Yeo Chiang Swee v. United Decorators And Shun Fah & Co The Said Yeo Chiang Swee Trading As Seng Hua Sawmill Co [1932] 1 LNS 100 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 4 r. 1, O. 32 r. 6, O. 49 rr. 1(1), 2, 3(2), 4(1), (2), O. 53 r. 2(4), O. 92

Other source(s) referred to:

Dictionary of Law, 4th Edn, LB Curzon, Barrister; Manitoba Law Reform Commission December 2005 p. 1
Law Relating to Banker & Customer in Australia, 1975, paras 3.4260 & 3.4280

A *For the appellant - Dhinesh Bhaskaran (Denise Tan with him); M/s Shearn Delamore & Co*

For the respondent - Ashmadi Othman (Zuratul Akmal Zubairi & Tan Ru En with him); M/s Che Mokhtar & Ling

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: W-03(IM)-30-03-2014 (affirmed)]

B

Reported by Najib Tamby

JUDGMENT

C **Suriyadi Halim Omar FCJ:**

[1] The RHB Bank Bhd (respondent) had granted housing loan and overdraft banking facilities (the facilities) to one Mohamad Najib bin Mohamad Amin (the JD), and, as part of the securities, monies in six fixed deposit accounts (the FD accounts) were pledged with the respondent in a D form of a letter of set-off dated 14 June 1999 (the letter of set-off).

[2] In 2000 the Malaysian International Trading Corporation Sdn Bhd (the appellant) sued the JD in the Singapore High Court in relation to a massive fraud committed by the JD against the appellant. After a full trial the appellant on 30 August 2002 obtained judgment in the sum of US$79 E million (about RM350 million then) against the JD. The Singapore High Court also made a finding of fact that the monies held by the respondent were held on trust for the appellant. For easy reference that US$79 million judgment will be referred to as the Singapore judgment.

F **[3]** The Singapore judgment was subsequently registered by the appellant in the Kuala Lumpur High Court under the Reciprocal Enforcement of Judgments Act 1958 on 10 March 2003.

[4] The appellant being the judgment creditor (JC), filed an *ex parte* application (encl. 9) naming the respondent as the garnishee, for an order that G all monies owed by the respondent to the JD be garnished and used for payment of the debt due under the Singapore judgment on 12 November 2003 pursuant to O. 49 of the RHC (O. 49 RHC).

[5] Without any opposition at this *ex parte* hearing the appellant was successful and an order to show cause (or colloquially called a garnishment H order *nisi*) was granted on 14 January 2004.

[6] For easy reference, the respondent who is drawn into the enforcement process is referred to as the garnishee whilst the judgment creditor is interchangeably referred to as the garnishor. The garnishor here is the appellant. The judgment debtor, who is not involved in this appeal, is I the abovementioned Mohamad Najib bin Mohamad Amin (JD).

[7] The garnishment order *nisi* was served on the respondent on 21 January 2004, but despite that service on the respondent, in exercise of its right of set-off, proceeded to uplift the FD accounts on 10 March 2004

to pay the JD's debt due to the respondent. The respondent began with the issuance of a letter of demand to the JD on 16 February 2004. The respondent also disposed the remaining charged securities of the JD. After realising the securities, only RM67,664.27 was left ie the only sum conceded by the respondent to be subject to the garnishment order *nisi*, eventually to be paid to the appellant in compliance with the High Court order of encl. 164. With that last refund of RM67,664.27 to the JD, the latter and the respondent owed each other nothing.

[8] Naturally interested in the FD accounts, the JD in a separate action filed an action to set aside parts of the garnishment order *nisi* on 3 June 2004 but was dismissed on 15 November 2005 by the SAR. The JD filed an appeal but failed before Lau Bee Lan J on 20 October 2009. As far as the JD was concerned the matter ended on 20 October 2009. It is noted that in this JD's application or subsequent appeal the respondent never intervened in the proceedings.

[9] The Senior Assistant Registrar (the SAR) granted the garnishment order absolute (order absolute) on 8 October 2013, though having granted to the appellant the garnishment order *nisi* way back on 14 January 2004.

[10] Being dissatisfied with the 8 October 2013 order absolute of the SAR, the respondent filed an appeal to the High Court. On 23 January 2014 the High Court dismissed the respondent's appeal wherein the following orders were made, namely:

(i) that the respondent's appeal against the decision of the SAR be dismissed;

(ii) upon consent by the parties, interest at the rate of 4% awarded by the SAR on 8 October 2013 was set aside;

(iii) the garnishee order *nisi* dated 14 January 2004 was made absolute;

(iv) the respondent to pay to the appellant the following, *viz*.:

(a) RM350,447.46 (being the amount from the six fixed deposit accounts) as at 13 April 2009; and

(b) RM64,667.27 being the surplus amount after the realisation of all the securities; and

(v) costs in the sum of RM5,000 to the appellant.

[11] The respondent successfully appealed to the Court of Appeal when on 3 October 2014 the High Court's orders were set aside.

[12] On 26 February 2015 the appellant obtained leave from us on the following questions of law, namely:

(i) whether a garnishee, whose rights to the judgment debtor's funds are being litigated in garnishment proceedings between the judgment debtor and the judgment creditor but who chooses not to participate in such

proceedings, is bound by the outcome of such proceedings pursuant to the principle laid down by the Privy Council in *Nana Ofori Atta II v. Nana Abu Bonsra II* [1958] AC 95 and the Court of Appeal in *Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor* [1996] 2 CLJ 270;

(ii) (a) where a garnishee has a prospective right of set-off over the judgment debtor's funds which has yet to crystallise, whether such funds can be garnished by the judgment creditor;

(b) if so, whether the garnishee is entitled to exercise its right of set-off and utilise the funds for its own benefit once it is served with a garnishment order *nisi*;

(c) whether the applicable principle of law is that laid down in *Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd & Anor* [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645; [1988] 1 MLJ 434 or *Binamin MJC Quarry Sdn Bhd v. Way Soon Construction Sdn Bhd; TRS Bina Sdn Bhd (Garnishee); Hong Leong Finance Bhd (Intervener)* [2001] 6 CLJ 213;

(iii) (a) whether a garnishee with a prospective right of set-off over the judgment debtor's funds, who is put on notice that the funds are held by the judgment debtor on trust for the judgment creditor, can exercise its right of set-off and utilise the funds for its own benefit; and

(b) whether the banking industry constitutes an exception to the principle of constructive trust in *Agip (Africa) Ltd v. Jackson* [1990] 1 Ch 265?

The Appellant's Submission

[13] As regards question (i) the appellant submitted that the respondent ought to have intervened during the JD's application of setting aside the garnishment order *nisi* or at the stage of the JD's appeal before Lau Bee Lan J. As the respondent had failed to do so the respondent was therefore estopped from re-litigating and re-arguing this issue of right of set-off. The gist of this principle was laid down in *Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor* [1996] 2 CLJ 270 and *Nana Ofori Atta II v. Nana Abu Bonsra II* [1958] AC 95.

[14] More on point, as far as the appellant was concerned, learned counsel for the appellant submitted that the respondent had violated the garnishment order *nisi*. It was never in dispute that the respondent was served on 21 January 2004 with the garnishment order *nisi*, the *ex parte* summons-in-chambers, and the supporting affidavit, which also enclosed the Singapore judgment. The appellant argued that the respondent was fully aware that the monies in the FD accounts were held on trust by the JD for the judgment creditor whilst the garnishment order *nisi* had frozen the monies in the FD accounts. Notwithstanding the garnishment order *nisi*, the respondent

wilfully exercised its right of set-off on 10 March 2004 pursuant to the letter of set-off and uplifted the FD accounts to satisfy the JD's debts due under the facilities.

[15] The appellant contended that the respondent was duty-bound to obey the garnishment order *nisi* and was not permitted to deal with the monies in the FD accounts, as provided for under O. 49 r. 3(2) of the RHC.

[16] In support of its stance the appellant referred to the case of *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210 where at p. 212 it was held that:

> a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside.

[17] Learned counsel for the appellant also submitted on the issue of constructive trusteeship, contending that the monies in the FD accounts were held on trust for the appellant. He argued that the moment the respondent knew that the Singapore Court had declared the monies were being held by the JD for the judgment creditor, the respondent thus assumed the role of a trustee. It was therefore not at liberty to exercise its right of set-off and utilise the monies for its own benefit.

[18] The appellant was lent further support by the case of *Agip (Africa) Ltd v. Jackson* [1990] 1 Ch 265, where at p. 291 it was remarked:

> ... if he received it without such notice but subsequently discovered the facts. In either case he is liable to account for the property ... from the time he acquired notice.

[19] Regretfully here, the appellant argued, the Court of Appeal completely failed to consider the respondent's knowledge of the trust and the ownership of the monies in the FD accounts being subject to the garnishment order *nisi* and the principles of constructive trusts, as laid down in *Agip (Africa) Ltd v. Jackson*.

The Respondent's Submission

[20] In reply learned counsel for the respondent submitted that the High Court's decision by Lau Bee Lan J on the JD's application against the JC could not bind the respondent regardless of whether the respondent had chosen to participate or otherwise.

[21] It was submitted that the cases of *Tradium* and *Nana Ofori* could not be applied to the current case as the JD's application was a separate proceeding unrelated to the issue or cause of action between the appellant and the respondent, as acknowledged by the Court of Appeal on 3 October 2014 in its judgment.

[22] Learned counsel for the respondent also submitted that the respondent at all material time was unaware of the subsequent events of the JD's application as the respondent was not privy to it. The JD's application involved different parties for different consideration.

[23] More importantly, the JD's application did not fully ventilate or adjudicate the issue of the respondent's right to set-off the FD accounts. Therefore, the JD's application did not affect or abdicate the rights of the respondent as provided for under O. 49 of the RHC.

[24] The respondent submitted that its right to uplift the FD accounts derived from the letter of set-off, had accrued long before the Singapore judgment was entered against the JD. It was also contractually stated that the JD had no right to freely deal with the monies in the FD accounts, being a security for the facilities granted by the respondent. It was argued that no garnishee order could have been made against the respondent for those monies.

[25] The respondent also ventilated that notwithstanding any notice of the Singapore judgment, the respondent had obtained legal and equitable rights over the FD accounts as early as 14 June 1999.

[26] Additional to the argument at para. 25 ie on the issue of the respondent having acquired equitable rights over the FD accounts, the respondent submitted that the case of *Binamin MJC Quarry* was more relevant than *Kedah Kelang Papan Sdn Bhd*. Learned counsel for the respondent strongly argued that evidentially there was no debt due by the respondent to the JD at the time when the respondent was served with the garnishment order *nisi*. The JD could not yet claim ownership or demand the return of the monies in the FD accounts. Those accounts had been pledged to the respondent as security for the facilities which were still 'alive' and functional.

[27] The principle of constructive trust was inapplicable here, as the respondent did not fall within any of the categories of a constructive trustee as laid down in *Agip*.

[28] To sum it up, the respondent argued that it was therefore justified in exercising its legal right of set-off.

Background Discussion

[29] As parties have alluded to O. 49 of the RHC it is important to reproduce r. 1 of this Order. It reads:

> Where a person (who is referred to as 'the judgment creditor') has obtained a judgment or order for the payment by some other person (who is referred to as 'the judgment debtor') of money, not being a judgment or order for payment of money into Court, and any other person within jurisdiction (in this Order referred to as 'the garnishee') is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

[30] In a nutshell, O. 49 r. 1 of the RHC entitles a successful judgment creditor to enforce a money judgment, and may require a third party who owes the JD, to pay to the judgment creditor the amount of debt due or accruing to the judgment debtor. This provision enables a judgment creditor to have the benefit of any debt owed by a third person (a 'stranger') to the judgment debtor to be assigned to the judgment creditor (*Dictionary of Law, 4th Edn, LB Curzon, Barrister; Manitoba Law Reform Commission* December 2005 p. 1).

[31] In order to take advantage of O. 49 of the RHC the judgment creditor must have obtained a money judgment or order against a judgment debtor ie, of a decision given by a court of law or other competent tribunal, as a result of a legal proceeding therein. A judgment or order on the other hand does not include a judgment or order for the payment of money into court.

[32] The judgment creditor then identifies a third party ie the potential garnishee who is indebted to the judgment debtor. That debt must relate to any debt due or accruing due to the judgment debtor. Thereafter the judgment creditor initiates the garnishment proceedings for the purpose of reaching the property of the JD held or owed by that third party.

[33] Procedurally, garnishee proceedings begins with the filing of an *ex parte* notice of application, supported by an affidavit in Form 98 (O. 49 r. 2). The affidavit will identify the judgment or order to be enforced, the amount remaining unpaid under the judgment or order at the time of the application, with the garnishee identified, and the applicant stating his belief that the garnishee is within the jurisdiction and is indebted to the judgment debtor.

[34] At this stage, the burden is on the garnishor, but without any opposition facing it, the latter invariably succeeds. As said earlier at para. 5 an order successfully obtained pursuant to this *ex parte* application order will be in Form 97 and is an order to show cause (garnishment order *nisi*).

[35] Despite the garnishment order *nisi* not being an absolute order, O. 49 r. 3(2) legislates that this order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in it (*Wearne Brothers Malaysia Sdn Bhd v. Gurdave Kaur & Anor; Baharuddin, Bernatt, Tan & Ker (As Garnishees)* [1979] 1 LNS 146; [1982] 1 MLJ 23). Generally, once the garnishee is served with the order, the debt is charged, and he '... cannot pay the debt to anybody but the garnishor without incurring the risk of having to pay it all over again (*Galbraith v. Grimshave & Baxter* [1910] 1 KB 339; *Nadikatly Anjana v. Bandi Ramakrisna* (1971) 1 Audh WR 832). This provision is the mainstay of the appellant's case.

[36] To make it absolute O. 49 r. 4(1) of the RHC, which must be read together with O. 49 r. 3 of the RHC, must first be complied with. For purposes of this second stage ie in order to obtain the order absolute, the garnishment order *nisi* must first be served personally on the garnishee and

also on the judgment debtor, unless directed otherwise. A return date is given, seven days after service, whereupon the garnishee attends a hearing in order to show cause, why he should not pay the judgment creditor the debt due from him to the judgment debtor. At the conclusion of the hearing the garnishment order *nisi* is either made absolute or not.

[37] In order to obtain a garnishment order *nisi* or an order absolute, the court must be convinced that the debt of the garnishee to the JD must relate to any debt due or accruing due to the judgment debtor. 'Any debt due or accruing due' is not exactly easy to understand, and as Jackson J in *Bank of Montreal v. IM Krisp Foods Ltd* (1996) 6 CPC (4th) 90 Sask CA said:

> Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines 'accruing as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnished ...

[38] What is clear here is that "any debt due or accruing due" to the judgment debtor by the garnishee includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured, notwithstanding any restriction as to the mode of withdrawal (O. 49 r. 1(1)). For purposes of this appeal, without a need for a detailed discussion, the FD accounts under discussion are definitely a deposit account with a bank (in this case, the respondent) within the meaning of this rule.

Analysis

[39] Jurisdictionally, a court under O. 32 r. 6 of the RHC or under O. 92 of the RHC, may set aside any *ex parte* order. In *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1989] 1 LNS 140; [1990] 1 MLJ 445 at 446-447, VC George J held that the court could even set aside an *ex parte* final order pursuant to O. 32 r. 6 of the RHC. This provision has general application to general applications and proceedings in chambers, and unless there were specific rules elsewhere that do away with the said rules of general application, it was applicable in an *ex parte* garnishment proceedings. In fact VC George J had no hesitation in holding that even if O. 32 r. 6 were inapplicable the court still was equipped with inherent jurisdiction to prevent injustice. See also *Hongkong And Shanghai Banking Corporation v. Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)* [1985] 1 LNS 119; [1986] 2 MLJ 86, [1984-1985] SLR 804 and *Lee Phet Boon v. Hock Thai Finance Corporation Bhd* [1994] 3 CLJ 466; [1994] 2 MLJ 448.

[40] The incompleteness of a garnishment order *nisi* or rule *nisi* (from Latin *nisi*, meaning "unless"), though a court order, is reflected in O. 49 r. 4(2) of the RHC. Under this provision the effect of a completed order (or order absolute) is clearly reflected. It reads:

> An order absolute under rule 1 against the garnishee may be enforced in the same manner as any other order for the payment of money.

[41] Recognition is thus given to an order absolute and unless further action is taken, as clarified by VC George, the garnishment order *nisi* is susceptible to being set aside. Order 49 r. 4 of the RHC empowers the court on further consideration of the matter, to refuse or allow the *ex parte* order to be made absolute. This provision reads:

> 4(1) Where on the further consideration of the matter the garnishee does not attend or does not dispute the debt due or claimed to be due from him to the judgment debtor, the Court may, subject to rule 7, make an order absolute in one of the forms in Form 100 under rule 1 against the garnishee.

[42] Due to the *ex parte* nature of the garnishment order *nisi*, when served on the respondent on 21 January 2004 the appellant agreed that the respondent had a right to set-off the FD accounts subject to the respondent successfully showing cause why the order should not be absolute. This is seen at para. 54 where the appellant conceded the following:

> RHB Bank therefore ought to have respected the Garnishee Order *Nisi*, and had no right to set-off the amounts in the Accounts, **unless** and until the Garnishee Order *Nisi* was set aside or **RHB successfully showed cause why the order should not be absolute**.

[43] By the concession above, as reflected in the bold portion, the appellant recognised the garnishee's right of set-off if it successfully showed cause why the order should not be made absolute. Therefore, if the order absolute is not granted by the court, regardless of having ignored the garnishment order *nisi*, the respondent will escape any retribution for lifting the FD accounts. No doubt if the appellant is successful then the end result might not be the same.

[44] I likewise see no reason to disagree with the concession made by the appellant.

[45] The question that must follow is:

> Could the garnishee in the circumstances of the case successfully prevent the garnishment order *nisi* from being made absolute hence justifying the lifting of the FD Accounts despite being served with it?

[46] My answer to this question is in the positive.

[47] Before supplying the reasons for my positive answer, a need arises for me to make mention of the approach undertaken by the appellant in this appeal first. The antecedent shows that the appellant at the SAR stage had successfully obtained a garnishment order absolute (order absolute) and subsequently affirmed by the High Court on 23 January 2014. That success was short-lived as the Court of Appeal on 3 October 2014 overturned the High Court's decision. Had the appellant not pursued the matter before us, the issue of the uplifting of the FD accounts would have become academic and a stale issue.

[48] Before us, instead of focusing on the law and the available evidence demanding that the order absolute should not have been set aside, the appellant had taken the unorthodox approach of attacking the disrespectful behaviour of the respondent. In a word, the appellant was attempting to persuade the court that if it succeeds in convincing us that the respondent had shown no deference to a court order when brushing aside the garnishment order *nisi*, an order absolute therefore must automatically follow.

[49] I find this submission rather unpalatable, as, not only did two unsuspecting contracting parties not foresee an outsider one day steamrolling over the priority rights of a creditor of the JD, but was also bound by the draconian and pervasive effect of a garnishment order *nisi*. The garnishment order *nisi* was served on the respondent on 21 January 2004 whilst the order absolute was given by the SAR on 23 January 2013 and affirmed by the High Court on 23 January 2014. The Court of Appeal overturned the 23 January 2014 order only on 3 October 2014 ie about ten years and nine months from the date of the garnishment order *nisi*! Whether it was due to the nonchalant attitude of the appellant or due to some technical glitch, perusing the chronology of events, had the respondent not have reasons to set-off the FD accounts, a serious injustice could have befallen it.

[50] Procedurally, surely that cavalier behaviour of the respondent must be reserved for another and separate proceedings and not to be intertwined with the factual matter before us? Whether the appellant will succeed in influencing us to bear upon the respondent swift retribution for ignoring the garnishment order *nisi* depends very much on whether the appellant succeeds in obtaining an order absolute ie by winning this appeal first. By no account was this distracting course of action helpful to the appellant.

[51] I now discuss the merits of this appeal. Without beating around the proverbial bush I ask myself these two pertinent questions, namely:

(a) Was the letter of set-off an equitable assignment and if so what was the effect; and

(b) Was there any debt due and debt accruing due to the JD from the respondent at the time when the *ex parte* garnishee application, which culminated in the garnishment order *nisi* was heard, and later served on the respondent?

Was The Letter Of Set-off An Equitable Assignment And If So What Was The Effect?

[52] To entitle a garnishor to enter judgment against a garnishee the garnishor must at the outset establish that the money sought to be attached belongs to the JD. In *Badeley v. Consolidated Bank* (1888) 38 Ch D 238, it was held that "a creditor can only attach by a garnishee order such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons".

[53] In *Plunkett v. Barclays Bank Ltd* (1936) 2 KB 107 judgment could not be entered to attach the money as it was actually trust money ie not of the JD. And if the debt due has been assigned, the alleged assignee must be given an opportunity to be heard (*Curran v. Newpark Cinemas Ltd* (1951) 1 All ER 295). A

[54] Back home in Malaysia, in *Tan Way Boon & Ors. v. Omar Marican Holdings Sdn Bhd & Ors* [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202; [1991] 1 MLJ 122, it was likewise held that a garnishee could not attach a debt that had been equitably assigned. Similarly, a judgment creditor was not entitled to garnish monies which the JD had parted with his interest, prior to the date of the garnishment notice (see *Yeo Chiang Swee v. United Decorators And Shun Fah & Co The Said Yeo Chiang Swee Trading As Seng Hua Sawmill Co* [1932] 1 LNS 100; [1933] MLJ 85 and *Holt v. Heatherfield Trust Ltd* [1942] 1 All ER 404). B C

[55] In *Glegg v. Bromley* [1912] 3 KB 474 it was clarified that, D

> first, that the assignment was made for good consideration, and that assignment was not an assignment of a mere expectancy, or of a cause of action, but was an assignment of property, that is, of the fruits of an action as and when recovered, and that it was consequently not void under 13 Eliz c.5.

[56] In the case before us, perusing the letter of set-off, it is abundantly clear that the assignment of the FD accounts by the JD to the respondent was made for good consideration as a security for the facilities. The respondent was entitled to withhold the FD accounts, and contractually permitted to exercise its right of set-off in the event the JD failed to regularise his accounts. E F

[57] Every case has its peculiar set of facts, and whether the garnishee has priority over a third party, depends very much on the available facts. In *Tan Way Boon & Ors v. Omar Marican Holdings Sdn Bhd & Ors* [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202; [1991] 1 MLJ 122, subject to the set of facts there, Mohamed Dzaiddin J (as he then was) recognised that a garnishee order could only attach debts which the debtor himself was free to deal with. The court there remarked: G

> The debtor himself is bound by an equitable assignment which is independent of the giving of notice. The garnishor, therefore, cannot attach a debt which has been equitably assigned, or in other words, the equitable assignee has priority over the person serving the garnishee order. H

[58] In the appeal before us the facts showed that the respondent had obtained an equitable right much earlier than the service of the garnishee order and thus could not be denied its legal and contractual right to set-off and utilise the funds in the FD accounts. I

[59] The respondent too had done the needful before setting off the FD accounts, by serving the letter of demand dated 16 February 2004 on the JD, on the premise that the latter had defaulted in the repayment of the facilities (p. 370 vol. 4/5). The reason for the issuance of the letter of demand on the JD was never disputed. The set-off therefore was in accordance with the letter of set-off (see cl. 4) which allowed the same towards satisfaction of the facilities when they actually became due and payable. If I may add, there was nothing to stop the respondent from calling the facilities pursuant to cl. 7(h) of the letter of offer for the housing loan. The default clause reads as follows:

> 7. Events of default
>
> All monies outstanding under the banking facility ... shall become immediately repayable by you upon demand being made ... upon the occurrence of any of the following events:
>
> a ...;
>
> h ... if legal proceedings suits or actions of any kind whatsoever (civil or criminal) ...

[60] Further, under item illegality of a clause in the letter of offer of the overdraft facilities dated 10 June 1999 it was stated "where ... any ... order ... makes it apparent ... that it is ... impractical without breaching such ... order ... for us to maintain, fund or give effect to our obligation hereunder, we shall not then be liable or obliged to make available the facilities."

[61] Here, the court proceedings in Singapore or the garnishment order *nisi* would fall squarely within the ambit of the above clauses thus enabling the respondent to demand repayment and thenceforth set-off the FD accounts.

[62] Even though the respondent as a garnishee was put on notice that the funds were held by the JD on trust for the judgment creditor, the respondent had first priority to satisfy the JD's debt by virtue of the chronology of events and the effect of the equitable assignment. More of this issue when discussing the constructive trustee argument. In short the garnishment order *nisi* was not binding on the respondent as it had obtained legal rights over the FD accounts way back on 14 June 1999 ie before the Singapore judgment of 30 August 2002.

Was There Any Debt Due And Debt Accruing Due To The JD From The Respondent At The Time When The Ex Parte Garnishee Application, Which Culminated In The Garnishment Order Nisi Was Heard, And Later Served On The Respondent?

[63] For easy reference I will call the initial proceedings as the *ex parte* hearing whilst the proceedings when the garnishment order *nisi* will be made absolute or not, as the *inter partes* hearing. At that *inter partes* proceedings there will be 'further consideration of the matter', with the 'matter' being the application heard at the *ex parte* hearing under O. 49 r. 1. So, could the

respondent succeed in convincing the court at the *inter partes* hearing that at the time when the garnishment order *nisi* was granted there was no actionable debt pending? In other words the respondent could not yet uplift the FD accounts as it was not yet due and payable to the JD. The JD was still then using the facilities. In simple language, at the *ex parte* garnishee application stage, and at the time when the garnishee was served with the garnishment order *nisi*, there was no "debt due or accruing due" to the JD.

[64] I now refer to some authorities on the crucial words in O. 49 r. 1(1) of the RHC *viz*. 'debt due or accruing due' to the judgment debtor. In *Kedah Kelang Papan*, a case relied upon by the appellant, the sum to be garnished was the retention sum in a construction contract. It was held that no garnishee order may be made unless some person at the time of the order was made was indebted to the judgment debtor. Therefore if there was a debt *in presenti* an order could certainly be made to attach the debt. If there was no debt *in presenti* but a *debitum in presenti* existed though payable in the future, such an order could still be made with regard to the debt, whether legal or equitable. This case was approved by *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357.

[65] In *Binamin MJC Quarry Sdn Bhd v. Way Soon Construction Sdn Bhd; TRS Bina Sdn Bhd (Garnishee); Hong Leong Finance Bhd (Intervener)* [2001] 6 CLJ 213, a case which took a contrary stand to *Kedah Kelang Papan*, and of which I am in full agreement, the issue before the court was also in relation to a retention sum. The debt claimed by Binamin was the retention sum withheld by the garnishee (TSR). In support of its right Binamin cited *Kedah Kelang Papan*. The SAR made an order attaching all debts due or accruing from the garnishee (TSR) to the JD (Way Soon) to satisfy the judgment sum obtained by the judgment creditor (Binamin MJC Quarry Sdn Bhd). TSR appealed before Abdul Aziz Mohamad J arguing that as the retention sum was not due and payable, Binamin (JC) had no right to it. TSR also argued that as it was entitled to withhold the retention sum, it was thus not "a debt due or accruing due" to Way Soon (JD) pursuant to O. 49 r. 1 of the RHC. The High Court held the view that Binamin (JC) should not have a greater right to the payment of the debt than Way Soon (JD) as it would not be entitled to claim the debt before it became due and payable. In short the retention sum was not a debt due and accruing from TSR to Way Soon. As time would be a factor on the outcome of the retention sum no part of the retention should be ordered paid to Binamin. The appeal was allowed and the SAR's order was set aside.

[66] In *Saw Swan Kee v. Sim Lim Finance (M) Bhd* [1985] 2 CLJ 356; [1985] CLJ (Rep) 286; [1985] 1 MLJ 221 there was no crystallised actionable debt against the developer judgment debtor by the garnishee. The garnishee therefore could not take the money to set-off secured and non-actionable debts. Had there been an actionable debt the garnishee there could set-off the RM25,000 but not in the circumstances of the case. Pursuant

A to the facts in that case the garnishor was entitled to garnish the money (RM25,000) held by the garnishee. An absolute order therefore could be given (see also *Pyne v. Kinna* 1877 IR 11 Rep CL 40).

[67] In *Hall v. Pritchett* [1877] 3 QBD 215, on the date when the attachment order was made, it was discovered that the judgment debtor had
B not completed his works, and hence no payment was payable to him. That being so, no debts existed, either payable or to be accrued to the judgment debtor.

[68] From the above cases, the common thread is that a debt due and
C payable to the JD must exist on the day the garnishee application was filed, in order to obtain the garnishment order *nisi*.

[69] As it were in this case, when the garnishment application was filed at the *ex parte* stage, the pre-condition of a debt due or accruing due' to the judgment debtor was non-existent. There was no actionable debt due or
D accruing due to the JD. The facilities were still running smoothly. The respondent would only be having a debt due to the JD upon the termination of the facilities and the securities, either wholly or partially (ie balance after settling any sums due) to be returned to the JD.

[70] For completeness, in the circumstances of the case too, the garnishor
E could not have attached the so-called debt as it had been equitably assigned to the garnishee.

Whether The Respondent Could Be Defaulted For Not Intervening In The JD's Application

F **[71]** I agree with the findings of the Court of Appeal that the issue between the appellant and the respondent was premised on the letter of set-off and was not concerned with whether the JD held the garnished accounts on trust for the appellant. The Court of Appeal rightfully held that the respondent had no duty to intervene in the JD's application as the dispute
G was between the appellant and the JD and it was premised on the Singapore judgment, in a case in which the respondent was not a party.

[72] I find no evidence before me to indicate that the respondent was aware that the monies in the FD accounts were from bribes and had been obtained fraudulently by the JD. More importantly, the respondent was
H never informed at all material times that the respondent was to hold monies in the FD accounts on trust for the appellant.

[73] I also observe that the issue or cause of action between the appellant and the respondent was different from that in the JD's application. The respondent was not bound by the outcome of the JD's proceedings as it was
I not a party to it. Neither were its rights litigated on its behalf.

[74] The nail that sealed the appellant's contention that the garnishee should have intervened into the JD's application to set aside the garnishee order to show cause is the chronology of events. The uplifting of the FD

accounts was on 10 March 2004 whilst the JD's application was on 3 June 2004. In other words, *vis-à-vis* the JD, by 3 June 2004 the matter was academic as far as the garnishee was concerned.

[75] Finally, I agree with the Court of Appeal that the learned judge at the court below had placed undue importance on the Singapore judgment, bearing in mind that it was a suit that was commenced by the appellant against the JD. The Singapore judgment came into the picture only when the respondent was served with the cause papers of encl. 9 on 21 January 2004. The respondent thereafter had rightfully filed an affidavit to oppose encl. 9 what with there being no money left to garnish. The respondent even went a step further by filing the appeal to the High Court when the garnishment order *nisi* was made absolute. In short, the respondent had taken all necessary steps in accordance with O. 49 by disputing it during the show cause stage.

Whether The Banking Industry Constitutes As Exception To The Principle Of Constructive Trust In Agip (Africa) Ltd v. Jackson And Others [1990] 1 Ch 265?

[76] In *Agip*'s case, it was held as follows:

> The first is concerned with the person who receives for his own benefit trust property transferred to him in breach of trust. He is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust; or if he received it without such notice but subsequently discovered the facts. In either case he is liable to account for the property, in the first case as from the time he received the property, and in the second as from the time he acquired notice.

[77] The appellant submitted that as the monies in the FD accounts were expressly declared trust monies for the appellant by the Singapore High Court, the respondent invariably held the monies as a constructive trustee for the appellant. It was therefore not at liberty to exercise its right of set-off and utilise the said trust monies for its own benefit.

[78] It is pertinent to point out that it is not incumbent on the respondent, as a bank, to ascertain the source of monies which customers bring into the bank (see *Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals* [2011] 7 CLJ 909 at p. 920). Here, there is no evidence that at the time of the set-off the respondent was aware that the monies in the FD accounts were declared as trust monies by the Singapore judgment, let alone was it aware that the said monies were from bribes. I therefore make a finding that the respondent was a *bona fide* recipient for value without notice.

[79] I now touch on the constructive trust argument put forth by the appellant. A constructive trust arises by operation of law, whenever the circumstances are such that it is unconscionable for a party to assert beneficial rights over property, and in the course of it denying the beneficial interest of another (see *Paragon Finance Plc v. Thimbleby & Co* [1999] All ER 400; *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381, *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949).

[80] That was the basic principle alluded to prior to the development of the law of constructive trust whenever parties asserted the existence of a constructive trust. In sequence, *Carl Zeis Stiftung v. Herbert Smith & Co (No. 2)* [1969] 2 All ER 377 and *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 3 All ER 97 started the development and was eventually extended to *Twinsectra Ltd v. Yardley And Others* [2002] 2 All ER 377. The new approach saw the introduction of a two-fold test of an objective and subjective test. This test which demands the additional subjective honesty ingredient was approved by *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1.

[81] In a gist apart from deciding whether the respondent in the current appeal was dishonest by the ordinary standards of reasonable and honest people, the additional question of whether the respondent knew on a subjective test that its act was dishonest when uplifting the FD accounts, has to be satisfied. For the appellant to succeed on the constructive trust argument, it must therefore overcome the threshold of the combined objective and subjective tests.

[82] From the evidence discussed comprehensively above, in particular the contents of the letter of set-off, subjectively the respondent believed that it had a right to uplift the securities and utilise the monies for its own benefit. With the burden on the appellant to establish the basic ingredients, I am satisfied that the appellant has failed to establish that con joined subjective test. On that premise the constructive trust argument posed by the appellant against the respondent must fail.

Conclusion

[83] The garnishee here has ignored a court order ie the garnishment order *nisi* and had exposed itself to the potential retribution of the court unless it succeeds in denying an order absolute to the appellant. I am satisfied that the respondent has successfully done this. In fact the respondent had done this earlier at the Court of Appeal stage when it set aside the order absolute meted down by the High Court.

[84] Having appraised the law and the evidence before me, I am satisfied that the Court of Appeal was right when it decided that the garnishee had successfully shown sufficient cause why the garnishment order *nisi* should not be made absolute. My reasoning may be split into two, namely:

(i) once the FD accounts were equitably assigned to the respondent, all rights of the JD over them had been taken away. The moment the JD was deprived of any rights over the FD accounts/debt the garnishor thus could not demand a non-existent debt to be attached; and

(ii) at the stage when the court granted the garnishment order *nisi*, and later served on the respondent, there was no debt due or accruing due to the JD, as he was still making payment. In a word the facilities were still

subsisting and nothing was due yet to the JD. This finding depends very much on a finding of fact. I have no reason to disagree with the factual finding of the Court of Appeal.

[85] I therefore find sufficient substance in the submission of learned counsel for the respondent that the appellant could not garnish the FD accounts just on the above two grounds. That being so, by no account could an order absolute have been meted down by any court at that *inter parte* hearing. As the appellant failed to convert the garnishment order *nisi* to an order absolute, I therefore hold the view that the respondent's right of set-off by uplifting the FD accounts could not be defeated.

[86] My learned brother Azahar Mohamed (FCJ) and my learned sister Zaharah Ibrahim (FCJ) have read this majority judgment in draft and have expressed their agreement with it.

[87] For the above reasons I dismiss the appeal with costs.

[88] Due to the set of facts of this appeal my answers to the questions of law granted by us are as follows:

(i) question (i) is answered in the negative;

(ii) question (ii)(a) is answered in the negative;

(iii) question (ii)(b) is answered in the positive;

(iv) question (ii)(c) is answered as follows-the case of *Binamin MJC Quarry Sdn Bhd v. Way Soon Construction Sdn Bhd; TRS Bina Sdn Bhd (Garnishee); Hong Leong Finance Bhd (Intervener)* [2001] 6 CLJ 213 is preferred;

(v) question (iii)(a) is answered in the positive; and

(vi) I find no necessity in answering question (iii)(b) in the circumstances of the case as the law of constructive trust has developed past that of *Agip*.

[89] Costs of RM20,000 are ordered. The deposit is refunded to the appellant.

Hasan Lah FCJ:

Introduction

[90] The appellant had filed this appeal against the decision of the Court of Appeal given on 3 October 2014 which allowed the respondent's appeal and reversed the High Court's decision given on 23 January 2014 that the respondent as garnishee had to pay the appellant the amount of RM350,447.46 in Mohamad Najib bin Mohamad Amin's (hereinafter referred to as "judgment debtor") six fixed deposit accounts as at 13 April 2009 and RM67,664.27 being the surplus arising from the foreclosure of the judgement debtor's properties assigned and held by the respondent.

[91] This appeal therefore involves issues that arose out of garnishee proceedings commenced by the appellant against the respondent in respect of monies held by the respondent in the six fixed deposit accounts of the judgment debtor.

[92] On 26 February 2015 leave was granted to the appellant by this court to appeal against the decision of the Court of Appeal on the following questions of law:

(1) Whether a Garnishee, whose rights to the Judgment Debtor's funds are being litigated in garnishment proceedings between the Judgment Debtor and the Judgment Creditor but who chooses not to participate in such proceedings, is bound by the outcome of such proceedings pursuant to the principle laid down by the Privy Council in *Nana Ofori Atta II v Nana Abu Bonsra II* ([1958] AC 95 and the Court of Appeal in *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1996] 2 CLJ 270?

(2) (a) Where a Garnishee has a prospective right of set-off over the Judgment Debtor's funds which has yet to crystallise, whether such funds can be garnished by the judgment Creditor?

(b) If so, whether the Garnishee is entitled to exercise its right of set-off and utilise the funds for its own benefit once it is served with a Garnishee Order *Nisi*?

(c) Whether the applicable principle of law is that laid down in *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, Garnishee)* [1988] 1 MLJ 434 or *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd* [2001] 6 CLJ 213?

(3) (a) Whether a Garnishee with a prospective right of set- off over the Judgment Debtor's funds, who is put on notice that the funds are held by the Judgment Debtor on trust for the Judgment Creditor, can exercise its right of set-off and utilise the funds for its own benefit?

(b) Whether the banking industry constitutes an exception to the principle of constructive trusts in *Agip (Afrika) Ltd v Jackson and Others* [1990] 1 Ch 265?

Background Facts

[93] The background facts of the case had been sufficiently set out by the Court of Appeal in its judgment. For the purpose of this judgment I will reproduce the facts of the case as found by the Court of Appeal which are relevant for the purpose of this appeal.

[94] The respondent had granted banking facilities to the judgment debtor and as part of securities, the judgment debtor's monies in six fixed deposit accounts were pledged with the respondent. The pledge was in a form of a letter of set-off dated 14 June 1999.

[95] Sometimes in 2000, the appellant sued the judgment debtor and 29 others in the Singapore High Court relating to a massive fraud perpetrated by the judgment debtor and other defendants on the appellant. The appellant, after a full trial on 30 August 2002, obtained judgment in the sum of US$79 million against the judgment debtor ("Singapore judgment"). The Singapore High Court found as a matter of fact that the judgment debtor was instrumental in the fraud and had accepted bribes of at least US$1.2 million from third parties. Those bribes had been mainly deposited in the judgment debtor's accounts in Kuala Lumpur.

[96] The Singapore High Court had also found that the monies in the six fixed deposit accounts were held by the judgment debtor on trust for the appellant.

[97] There is no dispute by the respondent that the Singapore judgment referred to and encompassed the six fixed deposit accounts with the respondent and as at 11 March 2004, the monies in the same were in the sum of RM350,447.46.

[98] The Singapore judgment was registered by the appellant on 10 February 2003 in the Kuala Lumpur High Court under the Reciprocal Enforcement of Judgments Act 1958.

[99] On 12 March 2003, the appellant filed an *ex parte* application (encl. 9) naming the respondent as a garnishee for an order that all monies owed by the respondent to the judgment debtor be garnished and be used for payment of the debt due under the Singapore judgment. The aforesaid application was granted in terms on 14 January 2004. The appellant also commenced garnishee proceedings against eight other parties.

[100] The 14 January 2004 *ex parte* garnishee order to show cause was served on the respondent together with the supporting affidavit of that application which contained the Singapore judgment on 21 January 2004. Hence, the respondent was fully aware of that judgment from that date.

[101] On 10 March 2004, the respondent proceeded to uplift the six fixed deposit accounts and utilise the same to pay off the judgment debtor's debt due to the respondent. The respondent had also sold the other charged securities of the judgment debtor and after realising the same, there was a surplus balance of RM67,664.27 which the respondent contended that this was the only amount subject to garnishment.

[102] On 3 June 2004 the judgment debtor filed an application to set aside five of the nine garnishee orders to show cause which included the order against the respondent. On 15 November 2005, the Senior Assistant Registrar dismissed the judgment debtor's application with costs. The judgment debtor's appeal against the Senior Assistant Registrar's decision was dismissed by Lau Bee Lan J on 20 October 2009. The judgment debtor appealed to the Court of Appeal against Lau Bee Lan J's decision but withdrew the appeal on 15 February 2012.

[103] Enclosure 9 was finally heard by the Senior Assistant Registrar on 8 October 2013 wherein she found in favour of the appellant resulting in a garnishee order absolute in terms of the application in encl. 9.

[104] The respondent then appealed to the High Court wherein the learned judge on 22 October 2013 dismissed the same and the following orders were made:

(a) The respondent's appeal against the decision of the Senior Assistant Registrar was dismissed;

(b) Upon consent by the parties, interest at the rate of 4% awarded by the Senior Assistant Registrar was set aside;

(c) The garnishee order *nisi* dated 14 January be made absolute; and

(d) The respondent pay to the appellant the followings:

(i) RM350,447.46 (being the amount from the six fixed deposit accounts set-off by the judgment debtor) as at 13 April 2009;

(ii) RM64,667.27 being the surplus amount after the realisation of all the securities; and

(iii) costs in the sum of RM5,000 to the appellant.

Decision Of High Court

[105] The learned judge firstly held that the respondent, after having full knowledge of the Singapore judgment which had been registered in the Kuala Lumpur High Court, could not on 10 March 2004 exercise a set-off to pay off the judgment debtor's overdraft. Secondly, it was held that the respondent held the monies as constructive trustee for the appellant and was legally obliged to return the monies to the appellant.

Decision Of Court Of Appeal

[106] In reversing the decision of the High Court, the Court of Appeal held that the respondent had no duty to intervene in the judgment debtor's application before the Senior Assistant Registrar on 15 November 2005 and appeal before Lau Bee Lan J as the dispute there was between the appellant and the judgment debtor and was premised on the Singapore judgment which the respondent was not a party. Secondly, the issue or cause of action between the appellant and the respondent was different as it was premised on the letter of set-off and did not concern as to whether the judgment debtor held the garnished accounts on trust for the appellant. Accordingly the Court of Appeal held that the principle of *res judicata* did not apply against the respondent.

[107] The Court of Appeal also held that the respondent was not bound by the Singapore judgment that the monies in the six fixed deposit accounts were tainted with illegality because the respondent was not a party to the

Singapore suit and secondly there was no evidence to show that the respondent was aware that the monies in the six fixed deposit accounts were from bribes and obtained fraudulently by the judgment debtor. In the Court of Appeal's view the respondent was a *bona fide* recipient for value without notice and its rights to the monies in the six fixed deposit accounts could not be affected by illegal conduct.

[108] The Court of Appeal also held that the judgment debtor had no claim on the monies in the six fixed deposit accounts until the secured amount had been fully paid. As such, when the appellant stepped into the judgment debtor's shoes, it too had no claim on the monies. On the two High Court cases cited to the court namely, *Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd* [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645; [1988] 1 MLJ 434 and *Binamin MJC Quarry Sdn Bhd v. Way Soon Construction Sdn Bhd; TRS Bina Sdn Bhd (Garnishee); Hong Leong Finance Bhd (Intervener)* [2001] 6 CLJ 213; [2001] AMEJ 202, the Court of Appeal agreed with the decision in *Binamin MJC Quarry Sdn Bhd v. Way Soon Construction Sdn Bhd; TRS Bina Sdn Bhd (Garnishee); Hong Leong Finance Bhd (Intervener)* (*supra*) that the retention sum in a construction contract could not be garnished as the retention sum was subject to a "a clean bill of health" in respect of defects in the construction.

The Appeal

[109] In his submission learned counsel for the appellant raised three grounds as to why the decision of the Court of Appeal cannot be sustained. Firstly, it was argued that the respondent was bound by the decision of Lau Bee Lan J given on 20 October 2009 as the key issue in encl. 9 and the judgment debtor's application to set aside the garnishee order to show cause was the same.

[110] Secondly, it was argued that the respondent's right of set-off had not yet crystallised. The respondent only exercised its right of set-off after being notified of the garnishee order to show cause and the appellant's rights over the monies in the six fixed deposit accounts. The respondent was therefore under the obligation to obey the garnishee order to show cause.

[111] Thirdly, it was argued that the monies in the six fixed deposit accounts were held on trust for the appellant. From the moment the respondent knew that the Singapore Court had declared the monies in the six fixed deposit accounts as being held on trust by the judgment debtor for the appellant the respondent held the monies as constructive trustee for the appellant and was not at liberty to exercise its right of set-off and utilise the monies for its own benefit. In support of that proposition learned counsel for the appellant cited the views expressed at paras. 3.4260 and 3.4280 in the Law Relating to Banker and Customer in Australia, 1975 and the decision of the English Court of Appeal in *Agip (Africa) Ltd v. Jackson and Others* [1990] 1 Ch 625.

A **Estoppel**

[112] The issue of estoppel as submitted by learned counsel for the appellant is more relevant to the first question of law posed in this appeal.

[113] Learned counsel for the appellant submitted that the key issue in
B encl. 9 and the judgment debtor's application in relation to the respondent was, whether the respondent was entitled to exercise a right of set-off over the monies in the six fixed deposit accounts.

[114] Learned counsel for the appellant further submitted that the respondent was fully aware of the judgment debtor's application and the
C judgment debtor's appeal before Lau Bee Lan J, but was content to let this specific issue be litigated and argued by the judgment debtor. The respondent took no steps to intervene in those proceedings, and was content to allow Lau Bee Lan J to decide this issue. The garnishee absolute proceedings against the respondent were even adjourned pending the outcome of the
D judgment debtor's application and the judgment debtor's appeal. Having allowed its battle to be fought by the judgment debtor, and the judgment debtor having failed in its arguments, the respondent then opposed encl. 9 on exactly the same grounds thereby relitigating the issue and effectively seeking to reverse Lau Bee Lan J's finding through the back door. Under the
E circumstances, the respondent should not be allowed to reopen the case and it is bound by the decision given by Lau Bee Lan J.

[115] In support of his argument that the respondent was bound by the decision of Lau Bee Lan J on the issue, learned counsel relied on the principle of law laid down by the Privy Council in *Nana Ofori Atta II v. Nana*
F *Abu Bonsra II* (*supra*) which was also relied upon by the High Court in dismissing the respondent's appeal against the decision of the Senior Assistant Registrar given on 8 October 2013 in respect of encl. 9 whereby the garnishee order absolute was made against the respondent.

[116] It was also contended by learned counsel for the appellant that what
G was done by the respondent amounted to an abuse of the process. In support of that proposition the Singapore High Court's case of *Kwa Ban Cheong v. Kuah Boon Sek and Others* [2003] SGHC 132 was cited.

[117] Learned counsel for the respondent, on the other hand, submitted that the decision of Lau Bee Lan J on the judgment debtor's application to
H set aside the garnishee order to show cause against the respondent could not bind the respondent regardless of whether the respondent had chosen to participate in the proceedings or otherwise. It was contended by learned counsel for the respondent that the case of *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* (*supra*) and *Nana Ofori Atta II v. Nana Abu Bonsra*
I *II* (*supra*) cannot be applied to the instant case because the judgment debtor's application was a separate proceeding unrelated to the issue or cause of action between the appellant and the respondent. This was also the finding of the Court of Appeal on 3 October 2014.

[118] It was also contended by the respondent that the decision in the judgment debtor's application had not fully ventilated or fully adjudicated the issue on the respondent's right to set-off the judgment debtor's six fixed deposit accounts. As such, the principle of *res judicata* raised by the appellant was not applicable to the respondent's case. The judgment debtor's application did not affect or take away the rights of the respondent which is provided under O. 49 of the Rules of the High Court 1980 to dispute its liability as a garnishee separately against the appellant and/or show cause why the garnishee order *nisi* obtained by the appellant ought not to be absolute.

[119] Alternatively learned counsel for the respondent submitted that the appellant had failed to inform the court and take steps at first instance to consolidate the judgment debtor's application with the respondent's appeal (encl. 164) pursuant to O. 4 r. 1 of the Rules of the High Court 1980. The appellant had chosen to defend against the judgment debtor's application separately. As such the appellant cannot now blame the respondent for failing to intervene with the judgment debtor's application. In support of that proposition learned counsel for the respondent cited the cases of *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 and *Mayban Trustee Bhd v. Amalan Tepat Sdn Bhd* [2006] 5 CLJ 43.

[120] As respondent was not bound by the outcome of the decision from the proceedings in the judgment debtor's application, learned counsel for the respondent urged this court to answer question No. 1 for this appeal in the negative.

[121] I begin my analysis of the issue by looking at the decision of Lau Bee Lan J given on 20 October 2009 whereby the judgment debtor's appeal against the Senior Assistant Registrar's decision to dismiss the judgment debtor's application to set aside the garnishee order *nisi* was dismissed. At para. 12 of her judgment dated 18 November 2011, the learned judge, *inter alia*, summarised the case before her as follows:

> ... The Plaintiff relied on the terms of the housing loan and overdraft agreements secured by several fixed deposits (exhs.A-1) and A-2 respectively) and on the Letter of Set Off (exh.A-3) contained in the Affidavits in Reply of the Garnishee affirmed by Choo Chooi Yan on 15.3.2004 (without encl. no.) and on 13.7.2004 (encl.59)

[122] At para. 14 of her judgment the learned judge made the following observation:

> 14. Secondly, flowing from the fact that the money in the RHB account was declared in the Singapore Judgment as far back as 30.8.2002 as held on trust for the JC and that the account numbers in Schedule 9 of the Singapore Judgment are the same as the numbers of the accounts held by RHB, subject of the garnishee proceedings, there is evidence to prove that RHB Bank was served with the Garnishee *Nisi* Order, *ex-parte*

A Summons in Chambers and the Affidavit in Support to which the Singapore Judgment was annexed, on 21.1.2004 at the latest (exh. II-8, paragraph 5(a) in encl. 58). However about 1 1/2 months after RHB Bank became aware of the provisions of the Singapore Judgment and the garnishee proceedings, they exercised their right of set-off on 10.3.2004 which they were not entitled to do so as stated in *The Law Relating to* B *Banker and Customer in Australia*:

(i) There is no right to set off the balance of an account which the bank knows to be a trust account against the customer's indebtedness in other accounts.

(para 3.4260); and C

(ii) In *Neste Oy v Lloyds Bank plc (The Tiisken)* [1983] 2 Lloyd's Rep 658 ... it was held that PSL was a constructive trustee of the payment and that the bank's knowledge of the facts put it on inquiry. For this reason the bank could not assert any right of set-off with respect to that payment.

D

[123] In *Nana Ofori Atta II v. Nana Abu Bonsra II* (*supra*) there was a dispute about the title to certain lands in Ghana belonging to the respondent. Both the appellant and the respondent were chieftains in Ghana. Some 16 years earlier, a chieftain subordinate to the appellant had laid claim to the same lands. The appellant, who was the person really interested in the lands in E dispute, had knowingly stood by while the earlier action was fought out.

[124] The question in the appeal before the Privy Council was whether it was open to the appellant to litigate in the action on the title to the lands in dispute. The question was whether the earlier finding precluded the appellant F from now claiming title against the respondent. The respondent contended that the appellant was so precluded on one or other of the two grounds: (1) estoppel by *res judicata* on the ground that a chieftain subordinate to the appellant was a party to the previous proceedings and the appellant was a privy to them; or alternatively, (2) estoppel by conduct on the ground that G the appellant knowingly stood by whilst the title was fought out by their subordinate in the previous proceedings and it would be inequitable to allow them to bring up the question again.

[125] Jackson J upheld the contention of the respondent on the second ground. The West African Court of Appeal upheld the contentions of the H respondent on both grounds. The result was that the appellant's claim had been dismissed.

[126] In dismissing the appeal, the Privy Council held that the appellant was estopped by its conduct from litigating the issue all over again. Lord Denning, who delivered judgment for the court, opined that the principle I formulated by Lord Penzance in *Wytcherley v. Andrews* [1871] LR 2 P&M 327 at p. 328 that "if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case," was applicable to the case.

[127] The principle formulated by Lord Penzance in *Wytcherley v. Andrews* (*supra*) was also applied by our Court of Appeal in *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* (*supra*). In that case, the first respondent had obtained an order for *certiorari* to quash the second respondent's approval of the proposed development to be undertaken by the applicant. The applicant did not apply to intervene in the High Court and it was only after the order for *certiorari* was granted that the applicant applied to be added as a party for the purpose of appealing separately to the Court of Appeal. This application was dismissed and instead of appealing against the dismissal the applicant moved the Court of Appeal by a notice of motion for an order that it be permitted to take part as an intervener in the appeal.

[128] In dismissing the application, the Court of Appeal held that the principle formulated by Lord Penzance in *Wytcherley v. Andrews* applied against the applicant. The Court of Appeal said that a person who had been served with papers pursuant to O. 53 r. 2(4) of the Rules of the High Court 1980 may decide whether to confine himself to address the judge if called upon by the judge, or go further and apply to have himself added as a party to enable him to exercise the right of appeal. The applicant had the requisite knowledge and opportunity to intervene to have itself added as a party to the substantive motion, but failed to do so at the earliest opportunity. The applicant having elected to confine itself to the limited right given to it by the rule cannot now claim to have an independent right of appeal.

[129] The issues of whether a previous decision involving different plaintiffs had decided legal and equitable rights of defendants and whether previous decision of court capable of operating *in rem* and binding upon world at large including a non-party to a previous action were considered by the High Court of Singapore in *Kwa Ban Cheong v. Kuah Boon Sek and Others* (*supra*). In that case, the plaintiff was the personal representative of Quah Koon Ann ("QKA"). QKA was the son of Quah Hing Soo ("QHS"). QHS died intestate. He was the founder of Quah Hiang Soo Pte Ltd ("the company"). The defendants were three of QHS's sons and the administrators of the fourth son's estate.

[130] The action concerned 360 shares ("the shares") in the company. By a directors' resolution dated 10 March 1976, QHS transferred the shares to his four sons in equal shares. Two days after the resolution was passed, QHS wrote a note which essentially stated that the shares were to be entrusted to the joint management of the four sons and that future dividends were to be distributed to the children of Kuah Khoon Loon and Wong Tuck Yoke as supplement for the schooling expenses of the children.

[131] In 1997, Lin Ke, one of the children of Kuah Khoon Loon, brought an action against the defendants. He claimed that by reason of the note, the defendants held the shares on trust for the benefit of the children of Kuah Khoon Loon and Wong Tuck Yoke. Amarjeet Singh JC found that QHS had absolutely and validly divested himself of the shares by making a gift of them to the four sons. The Court of Appeal dismissed Lin Ke's appeal.

[132] The plaintiff's case was that the shares were held by the defendants on a resulting trust for the estate of QHS and were to be distributed to his beneficiaries according to the Intestate Succession Act. The plaintiff, *inter alia*, argued that he was not bound by the earlier decision because he was not party to that action.

[133] The Singapore High Court held that a collateral attack on a final decision could be an abuse of process and the defendant who was sued in that situation was entitled to have the proceedings dismissed as an abuse of process. The present action against the same defendants was an attempt to relitigate issues and a collateral attack on the first action as to the title to the shares had already been determined. It was further held that apart from abuse of process, the action had to fail because the decision of Amarjeet JC operated *in rem* to settle the legal and beneficial interest of the defendants in the shares. Every judgment *in rem* was conclusive and binding upon the world at large and was not limited in its binding effect to those who were parties to the proceedings and their privies.

[134] At paras. 38 to 40 of the judgment the learned trial judge said:

> 38 Apart from abuse of process, a separate and independent ground why the plaintiff's action must fail is because the decision of Amarjeet Singh JC operates in rem. Every judgment in rem is conclusive and binding upon the world at large and is not limited in its binding effect to those who were parties to the proceedings and their privies. L P Thean JA delivering the judgment of the Court of Appeal in *Payna Chettiar v Low Meng Seng* [1998] 2 SLR 289 at 24 said:
>
> > In particular, a judgment *in rem* declaring the rights and title to a property to all the world is one which all persons are bound to observe and comply with.
>
> 39 An exposition of the relevant principles on judgment *in rem* is found in para 251 of Spencer Bower, Turner and Handley, the *Doctrine of Res Judicata* (3rd Ed, 1996). It reads:
>
> > To establish that a decision operates *in rem* and determines the status of a thing, all other conditions of a valid *res judicata* estoppel must be satisfied.
>
> 40 At para 19, the authors set out the constituents of *res judicata* estoppel. They are:
>
> (i) the decision was judicial in the relevant sense;
>
> (ii) it was in fact pronounced;
>
> (iii) the tribunal had jurisdiction over the parties and the subject matter;
>
> (iv) the decision was:
>
> (a) final, and
>
> (b) on the merits;

(v) it determined the same question as those raised in the later litigation; and

(vi) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was *in rem*.

[135] The appeal against this decision was dismissed by the Singapore Court of Appeal on 21 October 2003.

[136] Having carefully considered the facts and circumstances of the instant case and the authorities discussed above I agree with the submission of learned counsel for the appellant that the respondent is estopped by conduct from relitigating the issue relating to its right of set-off. With respect, I am unable to agree with the finding of Court of Appeal that the respondent had no duty to intervene in the judgment debtor's appeal to set aside the garnishee order to show cause before Lau Bee Lan J. From the judgment of Lau Bee Lan J it is clear that one of the issues before her was whether the respondent was entitled to exercise a right of set-off over the monies in the six fixed deposit accounts. In her judgment she held that the respondent was not entitled to do so.

[137] The respondent was content to stand by and see its battle fought by the judgment debtor on the issue of its right of set-off over the six fixed deposit accounts and as such it was bound by the result. In my judgment the principle formulated by Lord Penzance in *Wytcherley v. Andrews* applies to the respondent. The respondent cannot be allowed to reopen the case. Further, the decision of Lau Bee Lan J relating to the six fixed deposit accounts operated *in rem* to settle the rights of the respondent on the monies in the six fixed deposit accounts. The decision was conclusive and binding upon the respondent.

[138] In light of the foregoing I would answer the first question of law posed in this appeal in the affirmative. By answering the first question posed in this appeal in the affirmative I find it unnecessary to deal with the other two issues canvassed by learned counsel for the appellant and to answer the second and third question of law posed in this appeal as my finding on the first question is sufficient to dispose of this appeal.

[139] For the reasons given the appeal by the appellant is allowed with costs. My learned brother Abdull Hamid Embong FCJ has read the draft of my judgment and has expressed his agreement with it.